UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE OHIO BELL TELEPHONE COMPANY

and

Case 09-CA-196106

DANILLA ELMORE, AN INDIVIDUAL

Jonathan Duffey, Esq.,
for the General Counsel.
Amy Ryder Wentz and Jeffrey Seidle, Esqs.,
for the Respondent.

DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This hearing occurred on October 22-23, 2019, in Cincinnati, Ohio, over allegations The Ohio Bell Telephone Company ("Respondent") disciplined and later discharged Danilla Elmore because she engaged in statutorily protected activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act ("Act").

Elmore originally worked for Respondent as a bargaining-unit customer service representative at its Columbus, Ohio call center. In November 2015, she took an 11-month leave of absence. Upon her return, Respondent suspended and later terminated her because she violated the company's Code of Business Conduct while on leave. Elmore grieved her termination, and the parties settled the matter in early January 2017, by reinstating her under a last-chance agreement, at the company's Dayton, Ohio call center. Respondent required Elmore to attend a multi-week training class, with a group of new employees, and advised her that during training she would not be allowed to use her accrued vacation or leave.

On February 6, 2017, Elmore's training class spent a few hours shadowing experienced customer service representatives to observe and learn how they handled customer calls. The following morning, the trainer and supervisor held a "debrief" session to get feedback from the trainees about their experiences. Trainees commented that certain representatives failed to follow company procedure of gathering and providing required information while on the phone with customers. During this session, Elmore spoke up on behalf of herself and another trainee, stating that using those non-compliant representatives as role models was setting the trainees up for failure because they would get in trouble if they followed the

[1] Abbreviations herein are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "GC Exh." for General Counsel's Exhibits; "R. Exh." for Respondent's Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record.

representatives' example, and she wanted to know what the company was going to do to address the matter. Later that day, Elmore's supervisor placed a "Historical Log Report" in Elmore's personnel file, stating "we can not have that type of outburst anymore." The supervisor and trainer met with Elmore the following day and informed her that type of negativity and unprofessional conduct "could result in further disciplinary action up to and including termination." The General Counsel alleges Elmore was engaged in protected, concerted activity during the debrief session, and that Respondent prepared the Historical Log Report---which constitutes discipline---in response to that activity, in violation of Section 8(a)(1) of the Act. Respondent denies the allegations, arguing Elmore was not engaged in concerted activity and the Historical Log Report did not constitute discipline.

Shortly after training started, Elmore began raising concerns about her pay, specifically deductions and omissions from her January 27 paycheck. She also complained about not being allowed to use her vacation and other leave. Respondent and the union met and communicated with Elmore multiple times to address these concerns. Elmore, however, was not satisfied with those efforts. On March 14, 2017, while at work, Elmore spent one-third of her work time preparing and sending emails and instant messages to management about these concerns when she was supposed to be handling customer calls. On March 17, 2017, Respondent terminated Elmore for this conduct, stating she breached the terms of her last-chance agreement by misusing company time, mistreating customers, and fraudulent time reporting. The General Counsel alleges Elmore was trying to enforce her contractual rights, and Respondent discharged her for that conduct, in violation of Section 8(a)(3) and (1) of the Act. Respondent denies the allegation, arguing Elmore was discharged for the reasons stated.

As discussed below, I find Respondent violated Section 8(a)(1) by disciplining Elmore for her concerted activity during the debrief session, but it did not violate Section 8(a)(3) and (1) when it discharged her after she prepared and sent the emails and messages at issue during her work time.

II. STATEMENT OF THE CASE

On July 3, 2019, the Acting Regional Director for Region 9 of the National Labor Relations Board ("Board") issued a complaint in this case based on the charge Elmore filed on April 3, 2017 and amended on May 24, 2017. On July 17, 2019, Respondent filed its answer to the complaint, denying the alleged violations and raising various affirmative defenses.

At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and General Counsel filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following findings of fact, conclusions of law, and recommended order.

III. FINDINGS OF FACT[2]

A. Jurisdiction and Labor Organization Status

Respondent has been engaged in the business of providing telecommunications and entertainment services via telephone, internet, and television to business and residential customers within the AT&T family of companies. (Jt. Exh. 1). At all material times, Respondent has been a corporation with an office

[2] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief.

and place of business in Dayton, Ohio. In conducting its operations during the 12-month period ending June 1, 2017, Respondent performed services valued in excess of $50,000 in states other than the State of Ohio, and derived gross revenues in excess of $250,000. Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. As such, the Board has jurisdiction pursuant to Section 10(a) of the Act.

Communication Workers of America International Union ("CWA") is a labor organization within the meaning of Section 2(5) of the Act. CWA District 4 is a geographical subdivision of CWA. (Jt. Exh. 1). At all material times, Respondent and CWA District 4 were parties to a collective-bargaining agreement dated April 12, 2015 through April 14, 2018. (Jt. Exh. 5). CWA Local 4322 is a unit of CWA, within District 4's geographic region, representing employees in the greater Dayton, Ohio area. (Jt. Exh. 1). CWA Local 4310, also within District 4's geographic region, represents employees in the Columbus, Ohio area.

B. Unfair Labor Practices

1. Background

a. Respondent's Operations

Respondent operates call centers in Ohio where it employs customer service representatives who handle incoming customer calls. The company is subject to federal regulations regarding how quickly it handles those calls. To comply with the regulations, as well as to maintain customer satisfaction, the company forecasts expected call volume to determine staffing levels and work schedules to ensure it has adequate coverage to handle the calls in a timely manner. Respondent expects the representatives to maintain, on average, a 92 percent adherence rate with their work schedules. Deviations generally require supervisory approval. (Tr. 516-518).

Customer calls are routed through the company's automated system based on their question or concern, and the call is held "in queue" until a representative becomes available. When representatives are logged onto the computer system, they are expected to be open and available to handle incoming calls, and they are to handle those calls in accordance with company policies and procedures. Representatives can stop calls from going to their queue by logging off the system or changing their status to one that makes them unavailable to handle incoming calls. Changes in status require supervisory approval, which are referred to as "exceptions." (Tr. 118-120). These exceptions are requested through the computer system or, if there is an issue with the system, by communicating with the supervisor.

b. Paid Leave Under the Collective-Bargaining Agreement

The representatives working in Ohio call centers are covered under the collective-bargaining agreement between CWA District 4 and Respondent. Article 21 of the agreement provides for paid holidays. Article 23 provides for paid "vacation" days based on years of service. Vacation must be requested and approved in advance, usually in the fall of the prior year. Employees may carry over a portion of their unused vacation from one year to the next, and the remaining unused portion is paid out at the end of the year. Article 22 provides for "excused work" ("EW") days. They must be requested and approved in advance, but without previously requesting those days off as vacation. EW days do not carryover and are not paid out at the end of the year. There is a separate memorandum of agreement that provides "demand" personal days, which are EW days that do not need to be scheduled but are approved based on availability. Finally, Article 26.34 provides for "relocation days" when an employee is transferred. Relocation days must be requested and approved in advance and may be taken in conjunction with a

weekend or with vacation days for house hunting or moving. (Jt. Exh. 5; Tr. 430-437)). Employees must work at least six months before they are eligible for vacation, EW days, and demand days.

c. Elmore's Employment History and Prior Suspension and Termination

Danilla Elmore began working for Respondent in January 2014. Throughout her employment, she worked as a customer service representative at residential retention call centers. The primary function of these call centers is to retain or "save" customers who call the company looking to disconnect or otherwise cancel their residential service(s). Elmore was responsible for identifying and resolving the customers' needs to their satisfaction, retaining their business, and offering them additional and upgraded products and services. (Jt. Exh. 1). As a customer service representative, Elmore's pay was the combination of a base hourly rate (60 percent) and a commission rate (40 percent) for meeting company goals. (Tr. 452-453).

Elmore initially worked at the Columbus, Ohio residential retention call center, where she was represented by CWA Local 4310. (Tr. 458). In November 2015, Elmore began an 11-month leave of absence after she suffered the loss of multiple family members, within a short period of time. During this leave, Elmore received short-term disability benefits through the company's benefit administrator, Integrated Disability Services Center of AT&T ("IDSC"). A few days after returning to work in October 2016, Respondent suspended Elmore pending an investigation into whether she violated the company's Code of Business Conduct ("COBC") while on leave. The COBC is a policy broadly requiring that employees act with honesty and integrity in all aspects of their employment. (Jt. Exh. 6). The company believed Elmore violated the COBC by traveling out of state multiple times, including for vacations, while on paid disability leave, without prior notification to the IDSC. (R. Exh. 4). It came to this conclusion after reviewing Elmore's Facebook postings, as well as after-the-fact letters from her medical provider about how she could travel and engage in social activities but could not perform her job. Moreover, the company believed Elmore had not been forthcoming and honest during its investigation by withholding the dates she traveled while on leave. Elmore remained suspended for 19 days before she was terminated. The company eventually terminated her for violating the COBC by misusing company benefits and failing to act with honesty and integrity. (R. Exh. 4). Elmore filed a grievance over her termination.

Prior to Elmore's suspension and termination, Respondent announced it was closing its Columbus call center and "surplusing" the unit employees there. Under the collective-bargaining agreement, surplused employees have certain options, including "follow[ing] the work" to another call center. In this instance, Respondent allowed affected employees to rank whether they wanted to follow the work to Dayton, Ohio, Kalamazoo, Michigan, or Indianapolis, Indiana. Elmore ranked Dayton as her first choice. (R. Exh. 2). Respondent closed the Columbus call center in December 2016, while Elmore was on suspension.

d. Elmore's Back to Work Agreement and Transfer to Dayton

In late December 2016, Respondent and CWA Local 4310 agreed to settle Elmore's grievance by reinstating and transferring her to the Dayton call center, subject to a Back to Work Agreement. The Agreement conditioned reinstatement on her committing no further violations of the COBC for one year. (Jt. Exh. 2). Elmore sought to modify the terms of the Agreement, but Respondent refused. (Tr. 445).

In early January 2017,[3] Respondent's Lead Labor Relations Manager Rick Plant emailed CWA Local 4310 President Diane Bailey, stating that Elmore would need to attend a multi-week training class,

[3] Hereinafter, all dates refer to 2017, unless otherwise stated.

with a group of newly hired customer service representatives, beginning on January 9, at the Dayton call center.[4] He also stated that if Respondent did not receive Elmore's signed and unchanged Agreement by January 9, it would uphold her termination. (R. Exh. 4). Elmore returned the signed Agreement on January 8. (Jt. Exh. 2).[5] In a separate email, Plant advised Bailey and Elmore that Elmore could contact corporate human resources with questions about her benefits, 401(k), or pension. In this email, Plant also addressed vacation. He stated that granting vacation is based on the needs of the business, and, typically, vacation is not granted during the initial six weeks of training, but Elmore could use her demand personal days, if available. (R. Exh. 16).

Respondent has an unwritten policy prohibiting trainees from using vacation or EW days during training. As stated, the collective-bargaining agreement addresses eligibility and entitlement to this type of leave primarily based on the employee's length of employment. There is not an issue as most trainees are new employees with no accrued leave available to use during their training. Elmore, however, was unique in that she had accrued leave available to use.

e. Correspondence and Discussions Regarding Elmore's Use of Leave During Training

Elmore was scheduled to report to the Dayton call center to begin training on January 9, but she did not report until January 11. Respondent did not discipline Elmore for missing January 9 and 10, and, instead, agreed to treat those as paid relocation days. (Tr. 449-450). On January 11, Elmore arrived late for her first day. CWA Local 4322's Secretary/Treasurer Pete Houvourus called Rick Plant and asked that Elmore not be disciplined for being late, stating it had been a rough transition for her to get to the Dayton call center. Plant agreed and no discipline was issued. (Tr. 450).

On January 11, representatives from Respondent and Local 4322 held a meeting with Elmore. In attendance were Training Manager Sheila Bonds, Center Attendance Manager Melissa Sanders (by phone), Elmore, and Houvourus. (R. Exh. 30, pg. 1). Sanders informed Elmore she would need to attend all training and could not miss work, which meant she would not be permitted to use her vacation until the training was completed.[6] Elmore asked about using EW days, and Sanders stated she would need to investigate and get back to Elmore about the use of EW days. Sanders also informed Elmore that her absences on January 9 and 10 were coded as relocation days, and she had 4 relocation days left. Elmore stated she had been told she could use relocation days if the weather was bad, for snow days. Sanders stated she would check and get back to Elmore about the use of relocation days. (R. Exh. 30).[7]

[4] According to Plant, Respondent required Elmore to participate in this training class because she had been off work for nearly a year, and it wanted to prepare her for the differences between the Columbus and Dayton call centers and to introduce her to the new products and services the company began offering while she was on leave. (Tr. 448-449).
[5] On January 9, CWA Local 4310 filed a grievance over the length of Elmore's suspension, claiming the company took too long to investigate her alleged COBC violation. (R. Exh. 20). On January 25, Respondent settled the grievance and agreed to pay Elmore for 10 of the 19 days she was suspended. (Tr. 457-458). This payment is reflected in a separate January 31 check. (R. Exh. 12, pg. 11) (Tr. 464-466).
[6] Elmore submitted vacation requests, including days while she was in training. Sanders informed Elmore she could not take vacation during training. (GC Exh. 2, pgs. 17-18). In subsequent meetings, a CWA Local 4322 steward confirmed with Elmore that the company does not allow the use of vacation or EW days during training. (R Exh. 8).
[7] On January 13, CWA Local 4322 filed a grievance alleging Respondent took so long to investigate Elmore's COBC violation that she unable to use her EW days before they expired. Respondent settled the grievance and agreed to pay Elmore her unused 2016 EW days. (R. Exhs. 11 and 21) (Tr. 454-455). This payment is reflected in a February 2 check. (R. Exh. 12, pg. 12) (Tr. 466-467).

On Tuesday, January 17, Sanders emailed Elmore with responses to her questions. (R. Exh. 17). Sanders informed Elmore that her 2016 accrued and unused vacation *and* EW days would be paid out to her. As for her 2017 vacation, Elmore would need to submit her requests, but she would not be able to use vacation during training because it was important that she not fall behind. As for relocation days, Sanders stated those must be scheduled and may be taken in conjunction with a weekend or with vacation days for house hunting or moving, but they could not be used as snow days.

About 40 minutes later, Elmore sent Sanders an instant message, stating she did not want to be paid out for her 2016 vacation and EW days, and she had work accommodations (implying she wanted to use that leave for accommodation-related absences). (R. Exh. 7). Elmore claimed that she had, in writing, from Rick Plant that she can use her vacation, relocation, and EW days whenever she wanted, as long as the days were available.[8] Elmore also complained of Sanders' lack of follow through in timely responding to her questions, and she accused the company of making up discriminatory guidelines and maintaining a hostile work environment. She concluded by stating she would be using a half day of EW that day, and if that time was not available, she would be using a half day of relocation time "to pick up my car that is in the shop in order to look for apartments and relocate." (R. Exh. 17).

That day, Elmore notified Sheila Bonds she was taking a half day of relocation time, and she left for the rest of the day. After learning of this, Rick Plant emailed Dayton's Call Center Sales Manager, Vicki Allen, stating that this was improper and there needed to be a meeting with Elmore regarding the proper scheduling/use of relocation days. He conceded the company would have to pay Elmore for the half day of relocation because Bonds allowed her to leave. (R. Exh. 22) (Tr. 462-463).

On January 18, Respondent held a meeting with Elmore. In attendance were Elmore, Bonds, Local 4322 Steward Marvin Thompson, and Elmore's Coach/Supervisor David Wynn. Elmore was told that relocation days are for moving and looking for places to live, they must be requested 48 hours in advance, and they will be approved/denied based on the needs of the business. She also was told that relocation days, like vacation, may not be used during training. Her demand days, however, could be taken if available.

The topic then turned to job accommodations. Elmore audio-recorded this portion of the meeting, which was later transcribed and introduced into evidence. (R. Exh. 8). Elmore stated she had job accommodations in place before she transferred to the Dayton call center, and they should have transferred with her. Wynn informed her the company had no active job accommodation in place for her. They then discussed having Elmore contact IDSC about requesting accommodations, and they were going to allow her to do so while on company time. The following is the relevant portion of that discussion:

> MS. BONDS: We're going to let you call. Part of this right now is we're going to let you call them ….
> MRS. ELMORE: Yeah. But I don't get a chance and I'm not going to use up my break and my lunch.

[8] Elmore made this claim about Plant authorizing her to use her leave on more than one occasion. (R. Exhs. 6 and 8, pg. 4-5). However, the evidence establishes Plant refused her requests to modify her Back to Work Agreement, and he and other managers informed her multiple times that she would not be allowed to use her accrued leave (except for demand days) until training was over. (R. Exhs. 4, 5, 16, and 18). Elmore's misrepresentation to Sanders on this point---whether intentional or not---is one example of how Elmore tended to conflate or confuse what she wanted or believed to be true with the actual facts. This tendency, along with her often selective and self-serving recollection, are why I do not credit much of her uncorroborated testimony, as I found it to be generally unreliable.

> MR. WYNN: We're going to let you call to get this figured out. Because we want this to be fixed for you.
> MS. ELMORE: I tried that, but they kept telling me every time I'm even writing them and even though you told me to ignore the training class because I'm not a trainee. You know, that's what they told me. So when I'm asking you these questions to get answered, each rep wants to tell me, are you on break; are you on lunch. Because—are you serious. Well, first of all, I thought that's when we were on the phone. *So if were on the phone, of course we are not supposed to be typing and doing all that*. But we're not on a phone situation. And if I'm done with my assignment, if were just listening to a video and fortunately I'm more advanced. So I'm done and fast. Why couldn't I type in just remind to ask you a question. But that's just to me another excuse because you just don't want to answer the question.
> MR. WYNN: Well, we're going to actually assign you time that you can do this.
> MS. ELMORE: I appreciate that. Because that's all I've been begging for from day one.

(R. Exh. 8, pg. 8-9)(emphasis added).[9]

f. Elmore's Issues with Deductions and Omissions from January 27 Paycheck

On January 27, Elmore received her first paycheck for working/training at the Dayton call center. The check covered the pay period of January 8-21. (R. Exh. 12, pg. 10). After receiving this paycheck, Elmore emailed Melissa Sanders, claiming the company had not yet paid her for her 2016 accrued and unused vacation, and it made several errors on her January 27 paycheck. (R. Exh. 9). Elmore claimed: (1) the company deducted too much for 401(k) contributions and union dues; (2) it failed to pay her time-and-one-half for working on the Martin Luther King, Jr. Birthday holiday; (3) it only included a "training bonus" for 60 of the 80 hours in the pay period; and (4) it incorrectly indicated that she had been denied disability benefits for two weeks in late October 2016.[10] Representatives from Respondent and CWA Local 4322 met with Elmore regarding these issues numerous times, during her work time. (Tr. 46-49).[11] Elmore also emailed Respondent about these matters while at work.[12]

[9] On cross-examination, Elmore was asked about the italicized statement, and she claimed she meant representatives were not supposed to be searching the internet for personal reasons while on the phone. (Tr. 263-265). I do not credit this explanation. The context and wording of her statement makes clear she was referring to her communicating with human resources about her concerns, and she was acknowledging it would be improper for her prepare and send messages to human resources while on the phone with a customer.

[10] In early January, AT&T notified Elmore it overpaid her $368.90 in short-term disability benefits during her 2016 leave, and it was seeking repayment of that amount. Elmore disputed any overpayment. (GC Exh. 3, pg. 5). The circumstances for the alleged overpayment are unclear from the record. What is clear is $253 was initially offset from her January 27 paycheck (R. Exh. 12, pg. 10), and the remaining $115.90 was offset from her February 10 paycheck. (R. Exhs. 10 and 12, pg. 13). Respondent notified Elmore of this in a January 30 email. (R. Exh. 10).

[11] Elmore estimated there were about 27 meetings between January 11 and February 29 to address her various concerns, and each meeting lasted between 30-90 minutes. (Tr. 46-47). CWA representative Tomika Cooley-Pettus testified these meetings got convoluted because Elmore often wanted to discuss new or different issues than what the parties had scheduled and were prepared to discuss. (Tr. 401-402).

[12] Elmore accused Respondent of discrimination, harassment, hostile work environment, and retaliation, and she stated she wanted to file a formal complaint. Sanders and Allen provided her with contact information for filing a complaint. In late February, Elmore contacted Respondent's EEO representative, Lori McCullough, and left a message to discuss her concerns. McCullough returned Elmore's call and left a voicemail that their discussion would need to occur while Elmore was "on the clock" or "on company time." (GC Exh. 5).

On January 31, Respondent issued Elmore a check paying her time-and-one-half for the hours she worked on Martin Luther King Jr.'s Birthday. (R. Exh. 12, pg. 11) (Tr. 465-466). On February 2, the company issued Elmore another check for her 2016 accrued and unused vacation and EW days. (R. Exh. 12, pg. 12) (Tr. 466-467). Plant testified customer service representatives in training receive their hourly base rate and 100 percent of their commission rate for the hours they work, and Elmore had been informed of this. In the pay period at issue, Elmore worked 60 hours and had 20 hours of relocation (i.e., two 8-hour days on January 9 and 10, and 4 hours on January 17). The company paid Elmore her regular base rate ($19.60 per hour) and 100 percent of her commission rate ($12.73 per hour) for the hours she worked and just her base rate for the relocation hours. (Tr. 464).

On February 8, Vicki Allen emailed Elmore stating that to the best of her knowledge Elmore's pay concerns had been addressed, noting that: Elmore had been paid out for her accrued and unused 2016 vacation; human resources was addressing the union dues issue; and Elmore had been in contact with the 401(k) plan administrator to address her contribution concerns.[13] (R. Exh. 13). Elmore did not respond to Allen to dispute that her concerns had been addressed.

g. Training

As stated, Respondent assigned Elmore to a training class at the Dayton call center with 12 newly hired customer service representatives. (Tr. 616). Training lasted approximately 12 weeks, in total. The first eight weeks were in the classroom in the basement of the Dayton call center where the trainees received instruction about how to perform their job, including the company's policies and procedures when interacting with customers. After the classroom training, the trainees spent the next four weeks in "nesting." Nesting—like birds in a nest---is where the trainees begin performing their actual job duties with the assistance and oversight of their trainer and coach/supervisor.

2. Historical Log Reports Regarding Debrief Session

On February 6, Bonds and Wynn had Elmore's training class go to the fourth floor of the call center to observe experienced customer service representatives for a few hours. Bonds told the class to listen and learn from how those representatives handled calls. Each trainee was assigned to observe one or more experienced representatives. One of the representatives Elmore observed that day failed to comply with certain company policies, including about reading required disclosures to the customer. For example, the representative spoke to a customer who entered into a two-year contract for a product or service, and the representative failed to advise the customer the discounted price was for the first year only, and if the customer terminated prior to the end of the second year, there would be an early termination fee.

The following morning, on February 7, Elmore walked to classroom in the basement with other trainees. She listened as they talked about their observations from the day before. Two of the trainees commented that they also observed representatives fail to make required disclosures while on the phone with customers. This was a casual conversation, and there was no discussion about reporting these issues to management or taking any other action. (Tr. 247).

[13] The record does not reflect the reason(s) for the higher than normal deductions for 401(k) contributions and union dues, or what, if any, other steps were taken to address those matters. Elmore's subsequent paycheck stubs do not reflect whether those amounts were incorrect or whether she was ever reimbursed.

Later that morning, during class, Bonds and Wynn held a "debrief" session where they gathered the trainees together and asked what they learned from watching the experienced representatives the day before. Some of the trainees reported positive experiences, and some noted certain problems or issues with how the representatives handled their calls. One trainee spoke up and "was upset" because the representative she observed did not ask customers the "discovery questions" and "did not close" the way the trainees had been taught. (Tr. 285-286). Discovery questions are what representatives are to ask customers regarding their phone/internet/television usage and needs, which may be helpful in retaining the customers and possibly selling them additional products or services. (Tr. 285). The representatives are to "close out" calls by recapping what was discussed and reading the necessary disclosures to ensure the customer is aware of the relevant terms and conditions of any product or service purchased. There was a discussion about some of these concerns.

At some point, a trainee named Marcus whispered something to Elmore about his experiences the day before, and she told him, "Well, you need to say something Marcus, because you guys need to know what happened." (Tr. 286).[14] Elmore then spoke up and echoed the earlier concerns. She asked Wynn and Bonds whether management knew the representatives they were using as role models were not following company policies, adding that the company was setting the trainees up for failure because they could get in trouble if they followed the example set by those representatives, and she then asked what management was going to do to address the situation. (Tr. 81-82; 242; 286; 296; and 640).[15] Bonds responded they would let the company know and that what the representatives were doing was not proper procedure. (Tr. 82). Bonds then attempted to put a positive spin on it, telling the class they were going to be "game changers," and they were going to follow the rules and do it right. (Tr. 82). It is unclear how long the debrief session lasted or what the trainees did next.[16]

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[14] Elmore testified she spoke up for another trainee and believed his name was Reuben, but acknowledged she could be wrong about his name. (Tr. 275). Based on other evidence, I find the trainee's name was Marcus or Mark.

[15] Respondent's counsel cross-examined Elmore asking whether she wanted the representatives disciplined or discharged. Elmore responded, "They need to … fix what the issue was. That was wrong training to us. [They] were setting us up for failure ... But … I wouldn't want anyone to lose their job[.]" (Tr. 242).

[16] Wynn, Elmore, and former employee/fellow trainee Jenice Brown testified about the February 7 debrief session. Wynn testified Elmore indicated she was speaking for others, and she specifically mentioned "Mark" when she made her statements. (Tr. 642-643). Wynn also confirmed Elmore asked how they were going to address the situation, specifically, how the company was going to hold the representatives accountable. (Tr. 649-650).

Wynn offered varying descriptions of Elmore's demeanor and conduct. First, he testified she was "very loud" and "very aggressive." (Tr. 599). He then said she "got a little heated … her voice was raised, and maybe a little aggressive." (Tr. 638). He later said she was "basically yelling, raising her voice" and "[g]etting very heated, agitated" and "very intimidating." (Tr. 648). Wynn failed to provide any more details to explain what he meant. Brown and Elmore both deny Elmore ever yelled or acted aggressively during the session. (Tr. 84-85; 288; 301-302).

I credit Elmore and Brown over Wynn regarding this session. Brown appeared open, honest, and forthright in her demeaner; she testified in a consistent and convincing manner on both direct and cross-examination; and her responses were objective, exhibiting no bias for or against Elmore or Respondent. Elmore's testimony was logical and largely consistent with or corroborated by Brown.

In contrast, Wynn's testimony was vague and uncorroborated, particularly about Elmore's demeanor and conduct during the session. Respondent sought to introduce a document Bonds allegedly prepared summarizing the session, but it was rejected. Respondent did not call Bonds---an admitted supervisor and agent at the time of the session---to testify. The Board has held the "missing witness" rule allows a judge to draw an adverse inference against a party that fails to call a witness under its control and reasonably expected to be favorably disposed towards it, but the rule generally does not apply when the witness is a former supervisor. *Natural Life, Inc., d/b/a Heart and Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 1 (2018). The record is unclear as to Bonds' employment status or position with Respondent as of the hearing; therefore, I decline to draw an adverse inference based on Respondent's failure to call Bonds to testify. (Tr. 101-102).

Wynn later prepared a "Historical Log Report" regarding the February 7 debrief session. (GC Exh. 4). Managers and supervisors use these electronic log reports to document observations, interactions, trainings, and discipline of employees. (Tr. 353; 406). Respondent regularly considers these log reports in evaluating what, if any, action (disciplinary or otherwise) to take in a situation. (Tr. 406-407). Each log report has an identification number created when the document is generated, and the manager or supervisor completing the log report lists, among other information, the date of the occurrence, the topic and subtopic, the reason for the log, developmental notes, and management expectations. The log report is then saved under the employee's electronic personnel file. (Tr. 556-557).

In the Historical Log Report, Wynn listed the reason for the log as: "Team Debrief that got out of control, due to feedback delivery of disgruntled employee." Under the development notes, Wynn wrote, "Worked with student answering questions and keeping things calm as long as possible." Under management expectations, Wynn wrote [of Elmore]: "Speak in a way that allows others to absorb what you are saying. If you are yelling or speaking very aggressively we miss your message and we can not have that type of outburst anymore." (GC Exh. 4). Elmore later received a copy of this document when she received a copy of her personnel file.

On February 8, Wynn and Bonds, along with two Local 4322 representatives, met with Elmore. Wynn later completed a Historical Log Report concerning that meeting. (R. Exh. 30, pg. 12) (Tr. 648-649). According to the Historical Log Report, Wynn informed Elmore that "[a]ccording to the [company's] COBC, courtesy and being professional are required and it is not professional to disparage the company to a classroom of new hires." He also informed her they cannot have a situation like that again, where training is interrupted.[17] He added that inappropriate office conduct can be viewed as a violation of the COBC, and that "negativity and unprofessional conduct could result in further disciplinary action up to and including termination." (R. Exh. 30, pg. 12).

Also, in this meeting and in this Historical Log Report, Wynn separately addressed Elmore's writing emails during class time. He stated he had observed her writing emails the day before during training, and that her attention should be on the trainer and/or the materials at hand, adding that sending personal emails during work time can be viewed as a misuse of company time, which also is a violation of the COBC. (Tr. 649-650) (R. Exh. 30, pg. 12).[18]

3. March 17 Termination

In March, Elmore and the other trainees began the "nesting" phase of their training, where they were assigned to perform the duties of a customer service representative, with the guidance and assistance of a trainer, a coach/supervisor, and a lead person. They were moved up to the fourth floor, assigned a desk in an open cubicle with partitions. The trainees received daily work schedules with their start/end times, breaks, lunch hour, and any trainings or meetings. Break times and lunch periods are staggered to ensure there are enough representatives open and available to handle incoming calls. Aside from those scheduled events, the trainees were to be logged on and open and available to handle incoming customer calls. If they

[17] There is no evidence or explanation as to how Elmore's statements allegedly interrupted training.

[18] At the hearing, Elmore denied being told she was not permitted to send personal emails or instant messages during work time. (Tr. 291). I do not credit her denial. Respondent expects representatives to be focused on attending to customers in a timely and proper manner, and I credit that when Wynn saw Elmore sending emails or messages during class time, he informed her that such conduct was improper and could result in discipline.

had to deviate from their schedule or change their status to make themselves unavailable for calls, they had to get permission and request "exceptions" from their coach/supervisor. (Tr. 118-120; 388; 606-607).

On March 14, Elmore was scheduled to work from 8 a.m. to 5 p.m. She was to take a 15-minute break at 10:15 a.m., an hour lunch at 12 p.m., and a 15-minute break at 2:15 p.m. She was to be logged on to the system and handling incoming customer calls for a total of 7.5 hours that day. (R. Exh. 23).

From 8:00 to 9:32 a.m., Elmore was in an unscheduled meeting. From 9:32 to 9:41 a.m., she was logging onto her computer, and from 9:41 to 10:00 a.m., she was logged onto the system and open and available to take calls. Two minutes later, at 10:02 a.m., Elmore began her first break, 13 minutes early. During that break, Elmore sent an instant message to Laura Imming, a quality assurance manager in AT&T's Customer Loyalty Group. (Jt. Exh. 3, pg. 16). The message was addressed to "To Whom It May Concern." In the message, Elmore wrote that while classroom training was over, and they were doing regular job duties, she still was not being allowed to use her earned vacation time, and she was driving two hours each way to work, without being allowed to use relocation time. Also, she noted the company disciplined her quickly on the days she missed work because of doctor appointments, but it was not acting quickly regarding the concerns she raised about payroll and benefit errors she raised in January. She stated she needed time off, and the time is available, and she needed her missing income and relocation days so she did not have to continue traveling 4 hours a day to get to and from work. She ended with a plea for help to anyone with authority to get a prompt resolution. (Jt. Exh. 3, pg. 1).

Elmore returned from break at 10:16 a.m. From 10:16 to 10:43 a.m., Elmore was logging back onto her computer. (R. Exh. 23). At some time between 10:15 to 11 a.m., Elmore went to Vicki Allen and asked for 10 minutes off line. Allen sent her to speak to David Wynn, because he was her coach/supervisor. Elmore approached Wynn about taking a break and stated she had already talked to Allen. Wynn then checked with Allen to see if she had approved Elmore's request for time off line, and Allen stated she had not. Wynn then denied Elmore's request. (Tr. 653-654) (R. Exh. 23, pg. 3). From 10:43 to 11:12 a.m., Elmore coded herself as on a "health break." At 11:08 a.m., while on this "health break," Elmore emailed a copy of her "To Whom It May Concern" message to Bonds, Allen, Wynn, and other company officials. (Jt. Exh. 3, pg. 18).[19] Allen and Wynn testified they did not see these or Elmore's other messages until later in the day. At 11:12 a.m., Elmore logged back onto the system. She remained logged on until 11:34 a.m., when she coded herself as in "ACW" or "after call work." This is also referred to as "wrap." (Tr. 660). This is a status where representatives finish handling issues from a prior call and do not receive incoming calls. Representatives typically remain in ACW for about 30 seconds. (Tr. 586). Elmore remained in that status for 9 minutes. She logged back on at 11:43 a.m. At 11:51 a.m., Elmore sent an instant message to Marcia Henry, a technical assistant, about alleged inaccuracies about her leave requests on the company's online vacation planner. Henry responded to Elmore at 11:53 a.m., directing her to contact Daphne Ganahl. (R. Exh. 23, pg. 7). Henry forwarded Elmore's messages to Ganahl, along with a copy of Elmore's "To Whom It May Concern" message, which Elmore asked that she forward. Elmore took lunch at 12:10 p.m.

Early that afternoon, Ganahl responded to Henry, copying Elmore, Allen, and Wynn, stating that Elmore's leave entitlements were removed from the vacation planner while she was in training, and she

[19]Cooley-Pettus testified about two other Dayton call center employees who took "health breaks" but used them for non-health-related matters, and they were not discharged. (Tr. 336-337; 398-399). One of the individuals was on his phone during the breaks, for 7 or more minutes. (Tr. 410-411).

needed to complete nesting (scheduled to end around April 3) before she will be able to take leave.[20] Ganahl summarized the amounts of leave available to Elmore once she completed nesting. At 1:09 p.m., during her lunch break, Elmore emailed Ganahl, copying Allen and Wynn, claiming she was told she only needed to complete classroom training, not nesting, before she would be able to use her leave. Elmore also stated, "I am [a] contractual employee and I am entitled and you are superseding the union contract." (R. Exh. 23, pg. 9). She threatened to file a grievance and report the matter to the Labor Board. She also demanded interest and threatened to collect all fines and fees on paycheck errors she had been raising for 90 days. (R. Exh. 23, pg. 9). She did not specify in the email what those errors were.

Elmore was six minutes late returning from lunch. At 1:16 p.m., Elmore sent an email to Ganahl, copying Allen, complaining about a $115 deduction from her paycheck. She claimed she had been promised there would be no deduction, and she had already raised this issue with others without resolution.[21]

That afternoon, Ganahl replied to Elmore's "To Whom It May Concern" email, stating she was happy to help Elmore with her issues. She asked Elmore to provide more details about the alleged payroll errors from January, as she only recently took over handling the Dayton call center and was not familiar with the issues. Ganahl also referred Elmore to speak with Erin Walling at the Dayton call center about any benefit errors. As for Elmore's use of vacation and relocation days while in training, Ganahl stated she had addressed that in an earlier email (referred to above). (R. Exh. 23, pg. 10-11). Although Ganahl asked Elmore to provide her with information, she did not indicate any timeline for when Elmore was to respond.

From 1:55 to 2:19 p.m., Elmore changed her status from logged on to ACW, and she remained in that status for 24 minutes. During that period, she prepared and sent emails regarding her leave and paycheck concerns. At 2:16 p.m., she emailed Ganahl regarding the $115 deduction from her paycheck. (R. Exh. 23, pg. 15). At 2:18 p.m., Elmore emailed Bonds, Allen, Ganahl, and other company officials with a message that simply contained the subject line, "no more delays I needs [sic] my funds overnighted." (R. Exh. 23, pg. 18).

Ganahl forwarded Elmore's questions about the $115 deduction to Employee Relations Manager Lisa Robinson in Nevada. At 3:31 p.m., Robinson emailed Elmore, copying Allen and Ganahl, verifying that the only $115 deduction from Elmore's pay was to resolve her overpayment situation, which was closed out effective January 30. (Jt. Exh. 3, pg. 5).

From 2:30 to 5 p.m., Elmore was scheduled to be logged on and handling incoming calls. During that time, she logged off the system or made herself unavailable to handle incoming calls seven separate times (not including her break), for between 1 to 9 minutes each time. (R. Exh. 23). At 3:53 p.m., while in ACW status, Elmore emailed Robinson, stating the company had deducted the $115 from her check after it said it would not. Elmore also stated the company deducted incorrect amounts for 401(k) and insurance from her January paycheck. (Jt. Exh. 3, pg. 2).

That afternoon, after Wynn first learned about Elmore's emails and instant messages, he saw they were sent when she was scheduled to be logged on handling customer calls. He confronted her, asking her when she sent them. Elmore said she did it during "wrap" or ACW. Wynn informed her that was improper,

[20] The times on the emails to/from Ganahl differed by an hour based on who was sending/ receiving them (e.g., R. Exh. 23, pg. 9, 14), possibly because she was in Illinois, Central Standard Time, as opposed to Eastern Standard Time.
[21] This is another instance of Elmore alleging facts directly contradicted by other evidence. Respondent emailed Elmore in January clearly stating this amount *would be* deducted to satisfy the overpayment. (R. Exhs. 10 and 13).

and she could not send personal emails on company time.[22] Wynn later reviewed Elmore's calls to see if she had customers on hold when she was sending these communications, and he noticed there were "huge gaps of time" between calls, which was not normal. He also noted Elmore did not request exceptions to deviate from her scheduled status to send these communications during her work time.[23] (R. Exh. 30, pg. 28). Wynn eventually reported this to Allen. (Tr. 654-656).

Allen then reviewed the emails and instant messages Elmore sent that day and compared them to her adherence report to determine whether she prepared and/or sent the communication while she was handling, or supposed to be handling, customer calls. Allen also listened to Elmore's recorded calls and reviewed screen shots from Elmore's computer to see what she was looking at while on the phone with customers. (Tr. 588-590). In reviewing and comparing the information, Allen determined that: (1) in the late morning Elmore took an unapproved 29-minute "health break," during which she sent emails to a group of managers; (2) shortly thereafter she sent a second email to the same group of managers while she was logged on and receiving customer calls; (3) she later sent an instant message about her vacation entitlement while logged on and receiving customer calls; (4) she returned six minutes late from lunch and, during that time, she sent an email to managers when she was supposed to be logged on and taking calls from customers; (5) in the early afternoon she sent another email to multiple managers while she had a customer on the line; (6) an hour later she moved to ACW and sent multiple emails to multiple managers/supervisors; (7) shortly thereafter she sent another email to managers while she was on the phone with a customer; (8) she later again moved her status to ACW and sent another email and started working on another; and (9) she later prepared an email while on a customer call and she later looked at her payroll information online while on the phone with a customer. (R. Exh. 23, pg. 3).

According to Elmore's adherence report for March 14, she was scheduled to be logged on and handling calls for a total of 7.5 hours. She had unscheduled training for 1.5 hours at the start of the day, reducing her work time to 6 hours. She logged herself off or made herself unavailable to handle calls for at least 2 hours, or one-third of her work time. (R. Exh. 23, pg. 1). The record does not indicate how much time she spent preparing or sending communications while logged on and handling customers.

Allen later consulted with Rick Plant, and they agreed termination was warranted because Elmore was subject to a Return to Work Agreement prohibiting further violations of the COBC, and her conduct on March 14 clearly violated the COBC.

[22] Cooley-Pettus testified she communicated with the company about union matters during her work time, including while on the phone with customers, without being admonished or disciplined. (Tr. 333-334). Jenice Brown testified she would send emails or messages to supervisors about work-related issues, but there was one instance in which she instant messaged another employee who was complaining about needing time off from work, and Wynn intervened in their communications to let them know he could see what they were writing. (Tr. 303-305).

[23] Elmore testified she tried to enter an exception report into the system to account for her time spent on March 14 preparing and sending the communications at issue, but the system was down. According to her, she handwrote out her exceptions to give to Wynn, and Wynn wrote a sticky note to remind himself to key in her exceptions and reassured her he would take care of it. (Tr. 121-123). Again, I do not credit Elmore. Wynn denied receiving any requests from Elmore for exceptions for her time on March 14, and I find it highly improbable he would approve exceptions when she was logged off or unavailable to handle customer calls for 2 or more hours. Furthermore, Elmore never mentioned this during her March 17 termination meeting. Instead, she argued Wynn should have known what she was doing because his desk was near hers. (R. Exh. 34). I find it likely that if Wynn told Elmore he would approve her exceptions, she would not fail to mention that to Allen during the termination meeting.

On March 17, Allen met with Elmore and two CWA Local 4322 representatives. Elmore audio-recorded a portion of this meeting, and the recording and a transcript were introduced into evidence. (R. Exh. 34). Allen presented Elmore with the information she had gathered, including her emails and messages and her adherence report for that day. She asked Elmore why she was sending personal emails and instant messages during work time when she was supposed to be handling customer calls. Elmore stated she was looking for a response to her payroll and leave questions, and she continued to send emails when someone responded to her. Allen advised Elmore she was not to send emails on company time and that none of the emails from the company indicated she had to respond to them immediately, and she should have waited for a break. Elmore stated she was not going to waste anymore of her breaks or lunches. Allen told her that was the policy. Elmore then asked why no one said anything to her at the time when they knew she was sending the emails and instant messages. Allen responded they were not aware of it at the time.

Allen informed Elmore the company was terminating her employment because she violated the COBC and, therefore, her Back to Work Agreement by misusing company time, mistreating customers, and fraudulent time reporting.[24] Respondent provided Elmore with a copy of her termination letter. (Jt. Exh. 4). Allen then asked Elmore to turn in her building access card, and Elmore became verbally abusive, using profanity, and telling Allen she would have to come and physically get the access card from her. (R. Exh. 34). The remainder of the meeting was not part of the recording or transcript. (Tr. 598-599). According to Allen, Elmore tossed the access card/badge across the table and told Allen to go fetch it "like a fucking dog that she was." Elmore also threatened "to kick [Allen's] ass" multiple times. (Tr. 599-600). After Elmore left, Allen contacted the police to report what occurred out of concern for her safety.

IV. DISCUSSION & ANALYSIS

A. Witness Credibility

In assessing credibility, I primarily relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179

[24] Plant and Allen explained they found Elmore mistreated customers because she logged herself off from receiving incoming calls to prepare or send these communications, which meant that customers had to wait longer for assistance; and because when she was preparing and sending these communications while on the phone with the customers she was not fully focused on assisting them. (Tr. 472-473; 478-490; 574-576) (R. Exh. 23 pgs. 3-6).

Respondent presented evidence of four other employees discharged for similar misconduct. The first employee manipulated his call box to continually drop himself to the bottom of the queue, meaning he did not get incoming calls. The second employee did the same, but he also kept callers on hold for long periods and improperly handled transfers, also making him unavailable to handle incoming calls. The third employee kept customers on hold allegedly testing their line for long periods (which should take only a few minutes), making herself unavailable to handle incoming calls. She also logged off and took a "health break" to go outside to smoke and talk on her phone. When she returned, she walked around and talked with peers instead of returning to work. The fourth employee placed a customer on hold so she could look at the company's vacation planning tool to see what slots were available for her to request, and then she went into ACW status to continue that search rather than taking care of the customer. None of these other individuals were working under a Back to Work agreement. (Tr. 478-490; 574-576) (R. Exhs. 24-27).

F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951)). I have included my specific credibility determinations above in the Findings of Fact.

B. Respondent violated Section 8(a)(1) of the Act when it disciplined Elmore by placing a Historical Log Report in her file because she concertedly complained about the training during the February 6 debrief session.

Section 8(a)(1) prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Section 7 of the Act protects employees' right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus, to be protected under Section 7, the activity the employee engaged in must be "concerted" and must be "for the purpose of . . . mutual aid or protection." Although these concepts are closely related, Board precedent makes clear that they are analytically distinct:

> "[W]hether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers…. The concept of 'mutual aid or protection' focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'"

Quicken Loans, Inc., 367 NLRB No. 112, slip op. at 3 (2019) (quoting *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014))

Activity is concerted if it is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. See *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Furthermore, it is concerted activity for an individual to raise a complaint that is a "logical outgrowth" of the concerns raised with the group. *Mike Yurosek & Son, Inc*., 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd., 53 F.3d 261 (9th Cir. 1995). However, concerted activity does not include griping or activities of a purely personal nature that do not envision group action. See *Quicken Loans, Inc*., supra slip op. at 3 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). See also *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 1 (2019) (individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun). Overall, whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his/her coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers I*, 268 NLRB at 497. The Supreme Court has observed, however, that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. at 835. As stated, whether the employee's activity is for the "mutual aid or protection" focuses on its goal.

The "concertedness" and "mutual aid or protection" elements are analyzed under an objective standard. *Fresh & Easy*, 361 NLRB at 153. In making these factual determinations, the Board examines the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005).

In examining the circumstances here, I find Elmore was engaged in statutorily protected activity during the February 7 debrief session when, in the presence of the other trainees, she asked Wynn and Bonds whether management knew the representatives they were using as role models for the trainees were not following company policies, adding the company was setting the trainees up for failure because they could get in trouble if they followed the example set by those representatives, and then she asked what management was going to do to address the situation. The concerns Elmore raised about the non-compliant representatives were shared concerns, raised with and on behalf of others during the debrief session. Wynn acknowledged Elmore indicated she was speaking for others, and she mentioned Marcus specifically. The additional concerns Elmore raised were directly linked to, or the logical outgrowth of, the concerns she and other trainees raised about the non-compliant representatives before and during the session.

I also find Elmore's concerted activity was for the purpose of mutual aid and protection. After she raised concerns about the company using non-compliant representatives to act as role models for the trainees, she asked Wynn and Bonds what the company was going to do to address the situation.[25] *Dreis & Krump Mfg.*, 221 NLRB 309, 314 (1975) (employees' complaints regarding training issues fell within the scope of the "mutual aid or protection" clause). This was not, as Respondent contends, lashing out or personal griping to supervisors, or seeking to get other unit employees disciplined; it was a statement aimed at getting the company to stop using non-compliant representatives as role models, or to ensure the representatives modeled compliant behavior when training trainees. Bonds' response indicates she understood what Elmore was trying to do, stating she would let the company know what was going on, and that what the representatives were doing was not proper procedure.

Respondent disputes that Historical Log Reports were discipline. I reject this argument. The credible evidence establishes Respondent uses these Log Reports to document observations, interactions, training, *and* discipline of employees, and it considers what has (or has not) been documented when making disciplinary decisions. Furthermore, when Wynn and Bonds met with Elmore on February 8 about her conduct during the debrief session, they warned her that "negativity and unprofessional conduct could result in *further* disciplinary action up to and including termination." The use of the word "further" indicates the company viewed the Historical Log Reports and the meeting about her conduct as initial, albeit possibly informal, discipline for her speaking out. The Board has held initial informal warnings constitute "discipline" where, as here, they "lay a foundation" for future discipline. See generally, *Altercare of Wadsworth*, 355 NLRB 565 (2010); *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007); *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), enf'd. in relevant part 205 Fed. Appx. 405 (6th Cir. 2006).

When discipline is based on alleged misconduct that is part of the *res gestae* of protected activity, the proper inquiry is whether the employee lost the Act's protections in the course of that activity. See

[25] In the event a reviewing body determines Elmore's statements were individual remarks as opposed to collective concerns, I find those remarks qualified as group action. In *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 8 (2019), the Board recognized the factors for evaluating if individual remarks in a group meeting qualify as group action are whether: (1) the statement occurred in a meeting which announced a decision on terms and conditions of employment; (2) the decision affected more than one employee at the meeting; (3) the employee who spoke up did so only to protest or complain about the decision; (4) the speaker protested or complained about how the decision would impact the workforce, not just himself; and (5) the speaker did not have the opportunity to discuss the decision with employees beforehand because the meeting presented the first opportunity for employees to address the decision. All five factors do not need to be met. Rather, the determination is based on the totality of the evidence. Id. at fn. 45.

Although Respondent did not announce a decision during the debrief session, it elicited feedback from the trainees about their experiences. The use of the non-complying representatives affected multiple trainees. Elmore spoke up to protest how their use as role models could lead to trouble for all the trainees, not just her. In fact, it likely affected her less because she was an experienced representative, whereas the other trainees were new and still learning what was (im)proper procedure. Finally, the session was the first opportunity for her to raise these concerns with management and the class as a whole.

Desert Cab, Inc., 367 NLRB No. 87, slip op. at 1, fn. 1 (2019)(limo driver did not lose protection with sarcastic posts on Facebook page conveying to co-worker "friends" that employer's policy forcing them to wait long periods for customers decreased their income); *Public Service Company of New Mexico*, 364 NLRB No. 86, slip op. at 7 (2016)(steward lost protection during training meeting when he intentionally shut down the meeting by inserting his own demands, not allowing others to ask questions, refused to leave the meeting and after leaving and returning, demanded the meeting end and that employees leave).

Where an employer defends its discipline based on the employee's alleged misconduct in the course of otherwise protected activity, the Board's decision in *Atlantic Steel Co*., 245 NLRB 814 (1979), provides the appropriate balancing test for determining whether the discipline violates Section 8(a)(1). See *Entergy Nuclear Operations, Inc*., 367 NLRB No. 135 (2019); *Meyer Tool, Inc*., 366 NLRB No. 32, slip op at 1, fn. 2, (2018) enfd. 763 Fed. Appx. 5 (2nd Cir. 2019). Under *Atlantic Steel*, the question is whether in the course of Elmore's otherwise protected activity she engaged in conduct that was so egregious or opprobrious as to cause her to forfeit the Act's protection, which is based on a balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, supra at 816. This framework balances employees' rights under the Act and the employer's interests in maintaining workplace order and discipline. *Piper Realty*, 313 NLRB 1289, 1290 (1994).

The first factor---the place of discussion---favors protection or is at least neutral. In analyzing this factor, the Board considers the circumstances, including whether the conduct at issue occurred in the work area or during work time, was observed by other employees or customers, caused a disruption in the employer's operations, and/or undermined workplace discipline. See generally*, Kiewit Power Constructors Co*., 355 NLRB 708 (2010); *Datwyler Rubber & Plastics, Inc*., 350 NLRB 669, 670 (2007); and *Noble Metal Processing*, *Inc*., 346 NLRB 795, 800 (2006). Elmore's alleged "outburst" occurred in the classroom, during the debrief session, when Wynn and Bonds allowed trainees to provide feedback about what they learned from observing the experienced representatives. The Board has found an employee's outburst toward a supervisor in a place where other employees could hear may affect workplace discipline, but that is offset when the employer chooses the time and location to raise or discuss a controversial issue. See *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 280-281 (4th Cir. 2003), enfg. 337 NLRB 3 (2001), cert. denied 541 U.S. 973 (2004) (when an employer holds meeting and allows employees to ask questions or make statements, the employer should reasonably expect unfavorable questions or statements). Cf. *Eagle-Picher Industries*, 331 NLRB 169 (2000) (statement disruptive because employees told to hold questions until end of meeting). See also *Kiewit Power Constructors Co*., supra at 709 (employer that chose to distribute warnings in a work area during work time should have expected employee reaction on the spot).

The second factor---the subject matter of the discussion---strongly favors protection. As stated, Elmore was raising collective concerns, specifically how certain experienced representatives who were presented as role models were demonstrating behavior that, if followed, could lead to trouble for the trainees. *Datwyler Rubber & Plastics*, 350 NLRB at 630 ("outburst" during discussion of employee complaints about terms and conditions of employment weighed in favor of protection). Moreover, the stated purpose for the debrief session was to give the trainees the opportunity to offer their feedback about what they observed, and Elmore's comments were directly related to the trainees' observations.

The third factor---the nature of the outburst---also strongly favors protection. The Board recognizes that employees are permitted some leeway for impulsive behavior and intemperate language when engaged in protected activity, because the "protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumer Power Co*., 282 NLRB 130, 132 (1986); see also *NLRB v. Thor Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964). To that end, the Board has set a high threshold for conduct that

loses the protection of the Act. See generally, *Meyer Tool*, supra; *Goya Foods, Inc.,* 356 NLRB 476 (2011); *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991); and *Prescott Industrial Products Co*., 205 NLRB 51, 51-52 (1973).

Elmore's alleged outburst falls well short of losing the Act's protection. She did not use profane or offensive language and she was not disrespectful or insubordinate. Wynn's testimony, which I do not credit, was that Elmore was "basically yelling, raising her voice" and "[g]etting very heated, agitated." Even if I credited Wynn's vague and uncorroborated testimony, the Board has "repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection." *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101 (2011) (cases cited therein). See also *Roseburg Forest Products Co*., 368 NLRB No. 124, slip op. at 9 (2019) (raising voice, interrupting supervisor, and folding arms and then throwing hands in the air in response to supervisors' statements during group meeting did not lose Act's protection).

The fourth factor---whether the outburst was provoked by employer's unfair labor practice---does not favor protection or is neutral, because there is no claim Elmore was responding to any actual or perceived violation when she spoke up during the debrief session.

Overall, in applying the *Atlantic Steel* factors, I find Elmore did not engage in conduct that was so egregious or opprobrious to forfeit the Act's protection. I, therefore, conclude Respondent violated Section 8(a)(1) when it issued Elmore discipline by placing the Historical Log Reports in her personnel file regarding her protected, concerted activity during the February 7 debrief session.[26]

C. *Respondent did not violate Section 8(a)(3) and (1) of the Act when it discharged Elmore.*

The General Counsel alleges Respondent violated Section 8(a)(3) and (1) when it discharged Elmore because she engaged in protected activity when she prepared and sent the March 14 emails and instant messages complaining that the company denied vacation, relocation days, and wages she contends were contractually owed to her.[27] Respondent contends it lawfully discharged Elmore because her conduct violated the COBC and, as a result, the terms of her Back to Work Agreement. Both argue the applicable analytical framework is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983).

Where an employer offers a lawful reason for an allegedly unlawful employment action, the Board applies the mixed motive analysis set forth in *Wright Line*.[28] Under *Wright Line*, the General Counsel has the burden of persuading by a preponderance of the evidence that statutorily protected conduct was a motivating factor for the employer's decision to discharge. To prove this, the General Counsel must prove the employee engaged in protected activity, the employer had knowledge of that activity, and there is evidence of employer animus. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2-3 (2019).

[26] At the hearing, the General Counsel confirmed the complaint alleges the Historical Log Reports constituted unlawful discipline for the protected, concerted conduct, not that the statements therein were unlawful 8(a)(1) statements. (Tr. 550-551). I, therefore, need not address whether those statements independently violated the Act.

[27] There is no contention or evidence that Elmore's prior discipline for speaking out at the February 7 debrief session played any role in Respondent's decision to terminate her employment on March 17.

[28] "In [mixed-motive] cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities… This existence of both a 'good' and a 'bad' reason for the employer's action requires further inquiry into the role played by each motive." *Wright Line*, 251 NLRB at 1084.

If the General Counsel establishes these factors, the burden shifts to the employer to show it would have taken the same action in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089. The employer cannot simply present a legitimate reason for its action; it must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984). This burden may not be satisfied by an employer's proffered reasons that are found to be pretextual, (i.e., false reasons or reasons not in fact relied upon for the adverse employment action). *Lucky Cab Co*., 360 NLRB 271, 276 (2014). When the reasons for its decision are found to be pretextual -- that is, either false or not in fact relied upon -- discriminatory motive may be inferred but such an inference is not compelled. *Electrolux Home Products*, supra slip op. at 3

The first inquiry is whether Elmore was engaged in protected activity when she prepared and sent the March 14 communications at issue to members of management. An employee who raises a claim he/she in good faith believes involves a collectively-bargained right is engaged in protected union activity. *Interboro Contractors, Inc*., 157 NLRB 1295 (1966), enfd., 388 F.2d 495 (2d Cir. 1967). This doctrine was later affirmed by the Supreme Court in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). The Court held, in agreement with the Board, that an employee need not file a formal written grievance, nor explicitly refer to the bargaining agreement as the basis for his/her complaint, to be protected under the Act. Nor does the employee need to be correct in asserting the agreement has been violated for the activity to be protected. Id. If the employee's complaint or action is based on a reasonable and honest belief that rights under the agreement are being violated, and the statements or actions at issue are reasonably directed toward enforcement of a collectively-bargained right, he/she is entitled to the protection of the Act. *City Disposal*, supra at 837. See also *Tillford Contractors*, 317 NLRB 68, 69 (1995); *Bechtel Power Co*., 277 NLRB 882, 884-85 (1985).

Applying *Interboro* and *City Disposal*, I find Elmore was engaged in protected union activity. In her 1:09 p.m. email to Ganahl and others, she states she is a "contractual employee" who is "entitled" to her leave, and the company was "superseding the union contract" by not allowing her to use it, and she threatened to file a grievance. Although Respondent's (unwritten) policy bars employees from using vacation, EW days, and relocation days while in training, the collective-bargaining agreement addresses eligibility and entitlement based on the employee's length of employment, and Elmore was otherwise eligible and entitled to use leave. Furthermore, Plant's early January email to the union and Elmore stated that vacation typically is not granted *during the initial six weeks of training*. Elmore had completed classroom training when she sent these communications requesting to use leave. Under the circumstances, I find she had a reasonable and honest belief Respondent was denying her contractual rights, and that her communications to management seeking assistance were reasonably directed toward enforcing those rights. Elmore, therefore, was engaged in protected activity, and Respondent had knowledge of that activity.

The next issue is unlawful employer motivation or animus. "Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole." *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 11 (2019) (quoting *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003)). Circumstantial evidence may include suspicious timing, false or shifting reasons, failure to adequately investigate, departures from past practices, tolerance of behavior for which the employee was allegedly discharged, and disparate treatment. *Lucky Cab Co*., supra; *Medic One, Inc*., 331 NLRB 464, 475 (2000). The proffered evidence must be enough to establish a causal relationship between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie,* supra.

The General Counsel argues animus based on Respondent's demonstrated hostility toward Elmore after she raised concerns about her Back to Work Agreement, and when she continually complained about her pay and benefits throughout January and February. Although Respondent reluctantly reinstated Elmore

in January, there was no demonstrated hostility or animus for her raising concerns about her pay or benefits following her return to work. Quite the opposite, Respondent met with Elmore approximately 27 times over a two-month period to resolve those and other issues she raised. Management attempted to---and largely did---rectify all actual errors in pay within a few weeks of her raising them. It also met with her multiple times to explain its position on her using vacation and leave during training, albeit not to her satisfaction. I, therefore, decline to find or infer animus based on this evidence.

That being said, Respondent concedes it discharged Elmore because she prepared and sent the March 14 communications; not based on their content, but on how and when they were prepared and sent. Respondent argues she violated the COBC and, in turn, the terms of her Back to Work Agreement by: (1) misusing company time—preparing and sending the communications at issue while she was scheduled (and paid) to handle customer calls, including taking an unauthorized 29-minute "health break" to prepare and send messages; (2) customer mistreatment—logging off to prepare these communications while customers waited on hold, or failing to properly attend to customers by handling calls while simultaneously preparing and sending these communications; and (3) fraudulent time reporting—listing the time she spent preparing and sending these communications as work time.

The General Counsel argues animus should be inferred because Respondent's proffered reasons are pretext. First, he contends the company previously advised Elmore these communications should occur during work time. To support his assertion, the General Counsel cites to Elmore's testimony that when she called human resources to raise concerns about her pay or benefits, the representatives there told her she needed to have her supervisor on the phone and she had to call while at work. Even if I credited this testimony, these statements did not authorize Elmore to initiate communications whenever she wanted, and certainly not while she was scheduled to work handling customer calls. Moreover, these statements are not inconsistent with the company policy that communications of a personal nature should occur during break time, including during one of her two paid 15-minute breaks. Elmore, however, refused to communicate with human resources during her breaks or lunch. The General Counsel also cites to EEO representative Lori McCullough's voicemail message for Elmore in which McCullough stated that their discussion about Elmore's concerns would need to occur when Elmore was "on the clock." Respondent holds all meetings involving non-exempt employees during work time to ensure compliance with wage and hour laws. McCullough's message simply confirmed the same would be true regarding her meeting or discussion with Elmore. Along these same lines, the General Counsel relies upon documents the company distributes to managers and supervisors to ensure they comply with wage and hour laws. These documents make clear the company cannot require or permit non-exempt employees to perform work, including checking e-mails or attending meetings, outside of their normal work hours. They do not state that if employees *choose* to prepare and send communications to the company about personal concerns, it must occur during work time.

Also, the General Counsel argues Respondent previously tolerated Elmore sending similar emails and messages during work time, without disciplining her. This ignores the credited evidence that in early February, when Wynn saw Elmore sending personal emails during training, he told her that was not allowed, and it could be viewed as a misuse of company time, in violation of the COBC. Additionally, even if Respondent allowed her to send these communications in January and February, that was while she was in classroom training. In nesting, which began in March, she was responsible for handling customer calls, and there is no evidence the company knowingly allowed her to prepare and send personal communications while she was, or was supposed to be, handling customer calls.

The General Counsel further argues that managers and supervisors knew Elmore was sending these emails and messages on March 14, and no one said anything to her. Elmore sent these communications to local, regional and national managers. There is no evidence the regional and national managers knew Elmore's work schedule or that she was engaged in this conduct during her work time, and the local managers, Allen and Wynn, who knew her schedule did not learn of her conduct until later in the day when

they looked at their emails. When Wynn saw the communications, he went and confronted Elmore. Wynn then spoke with Allen, and she conducted her investigation.

Elmore, however, already knew what she was doing was improper. She knew from Wynn that sending these types of emails during work time was not permitted. Also, when Wynn and Bonds met with Elmore to discuss job accommodations, they said they were going to allow her to contact IDSC during her work time. If, as the General Counsel argues, Respondent had authorized Elmore to communicate about these types of matters during work time, there would be no reason for Wynn to allow her time to contact IDSC during her work day. In this same conversation, Elmore discussed her prior attempts to communicate with human resources about her concerns, and while she believed those communications should occur during work time, she acknowledged she, of course, should not be typing messages or anything like that while on the phone with customers. Yet, that is what she did here, and it was what led to her discharge.

The General Counsel also argues disparate treatment. He points to CWA representative Tomeka Cooley-Pettus, who communicated with the company about union matters during her work time, including while on the phone with customers, without being admonished or disciplined. These situations are not comparable. Cooley-Pettus was addressing union matters in her capacity as a steward, and Article 10 of the collective-bargaining agreement authorizes stewards to confer with the company, including, but not limited to, processing grievances, during their regular working hours. Additionally, the instances of Cooley-Pettus handling union matters while on the phone with customers appear to be few and brief. Elmore, in contrast, spent one-third of her work time on March 14 sending the communications at issue, without permission, including repeatedly making herself unavailable to handle incoming customer calls. As for other examples the General Counsel raised about employees sending messages during work time, the evidence indicates those messages were work-related, and, if they were not, Wynn intervened.

The General Counsel introduced evidence of two other employees who took "health breaks" for non-health-related matters, who were not discharged. A key distinction is these other employees requested and received permission to take the health break(s) at issue. Allen and Wynn both denied Elmore's request for an additional break, but she took it anyway. Also, the length of the break(s) for these other employees is unclear, but it appears to have been around 7 minutes; Elmore's break was for 29 minutes.

The General Counsel also points to three other employees who were out of adherence between March 14-17, who were not disciplined. But there is no evidence what these employees were doing or why they were out of adherence. Regardless, Respondent did not discharge Elmore for being out of adherence on March 14; it discharged her for misusing company time, mistreating customers, and fraudulent time reporting, which violated the COBC and her Back to Work Agreement.

The General Counsel asserts animus should be inferred based on the timing of Elmore's discharge in relation to her protected activity. Timing alone may be enough to infer unlawful motivation, but the operative word is "may," not must. *U.S. Cosmetics Corp.*, 368 NLRB No. 21 fn. 6 (2019). Additionally, animus need not be inferred when there is a legitimate, alternative explanation for the timing of the adverse action. Here, as stated, Elmore's conduct of preparing and sending the communications during work time, without permission, violated the COBC and her Back to Work Agreement, and the General Counsel failed to refute that evidence. As a result, I decline to infer animus based on timing alone.

Thus, while Elmore engaged in statutorily protected activity and Respondent knew about it, the General Counsel has failed to prove that Respondent had animus for protected activity or that such animus was a motivating factor in the decision to discharge her.

In any event, assuming arguendo that the General Counsel succeeded in proving animus, and the burden shifted, I find Respondent has established it would have discharged Elmore in the absence of her

protected activity. It discharged four other employees for comparable misconduct, and, unlike Elmore, they were not subject to a Back to Work Agreement prohibiting any further violation of the COBC, which prohibits acts of dishonesty. The General Counsel argues these four are not comparables because they acted with deceptive or malicious intent to loaf or avoid work, whereas Elmore actively engaged with managers and supervisors all day about her concerns, demonstrating she genuinely believed her conduct was permissible. For the reasons stated, I do not find Elmore genuinely believed her conduct was permissible. Nor did she disclose to these managers and supervisors that she was preparing or sending the communications at issue during her work time, when she was scheduled to be logged on and handling customer calls. And, contrary to the General Counsel's assertion, Elmore did engage in intentional misconduct on March 14; she sent these emails and messages during work time knowing from Wynn that such conduct was not allowed, and she took the 29-minute health break to send an email after Allen and Wynn both denied her break requests and told her to return to work.

I, therefore, conclude Respondent did not violate Section 8(a)(3) and (1) of the Act when it discharged Elmore, and I recommend this allegation be dismissed.[29]

CONCLUSIONS OF LAW

1. Respondent, The Ohio Bell Telephone Company, is an employer engaged in commerce out of its Dayton, Ohio facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by disciplining Danilla Elmore by placing in her personnel file the Historical Log Reports regarding her protected, concerted conduct during the February 7, 2017 debrief session.

3. The foregoing unfair labor practice affects commerce within the meaning of Section 2(2) and 2(7) of the Act.

4. Respondent has not violated the Act except as set forth above, and I recommend dismissing the remaining allegation.

REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, I recommend an order requiring that it rescind and remove from its files any reference to the disciplinary Historical Log Reports regarding

[29] Although both the General Counsel and Respondent contend *Wright Line* applies, and I generally agree, I note the result would not change if the case were analyzed under *Burnup & Sims*, 379 U.S. 21 (1964), which applies when the decision to discharge is based on the employer's honest belief that the employee engaged in misconduct during the protected activity. Under that test, the Board considers whether: (1) the discharged employee was at the time engaged in a protected activity; (2) that the employer knew it was such; (3) that the basis of the discharge was an alleged act of misconduct in the course of that activity; and (4) that the employee was not, in fact, guilty of that misconduct. Id. at 23. The employer carries its burden of showing that it held an honest belief that the employee engaged in misconduct, and the burden then shifts to the General Counsel to affirmatively show the misconduct did not, in fact, occur. *Roadway Express, Inc*., 355 NLRB 197, 204 (2010); and *Pepsi–Cola Co*., 330 NLRB 474 (2000). Respondent, through its investigation, had an honest (and accurate) belief Elmore engaged in misconduct in the course of her protected activity because, as stated, it involved misusing company time, mistreating customers, and fraudulent time reporting, which violated the COBC and, in turn, the terms of her Back to Work Agreement. The burden, therefore, shifts to the General Counsel to establish the alleged misconduct did, in fact, not occur. The General Counsel does not dispute the underlying facts about how and when Elmore prepared and sent the communications at issue. Rather, he argues for the reasons stated that the activity was not misconduct and/or Respondent treated similar conduct differently. I have rejected those arguments. I, therefore, find the General Counsel has failed to meet his burden.

her conduct during the February 7, 2017 debrief session, and to notify her in writing that this has been done and that they will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

1. Cease and desist from

(a) Disciplining or otherwise discriminating against employees because they engaged in protected, concerted activity;

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the discipline issued to Elmore regarding her conduct during the February 7, 2017 debrief session, and within 3 days thereafter, notify said employee in writing that this has been done and that the discipline will not be used against her in any way.

(b) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., December 27, 2019.

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ANDREW S. GOLLIN
ADMINISTRATIVE LAW JUDGE

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT discipline or otherwise discriminate against employees because they engaged in protected, concerted activity under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL remove from our files any reference to our unlawful discipline of Danilla Elmore, and we will notify her in writing that this has been done and that the discipline will not be used against her in any way.

THE OHIO BELL TELEPHONE COMPANY

(Employer)

DATED: _____ **BY**_____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-196106 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3733.